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IV — *Livy i, 26 and the Supplicium de More Maiorum*

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THE object of this paper is to show that there existed from the earliest times at Rome a distinct and legally recognized mode of administering the death penalty, in which the culprit was beaten to death with rods, and that this punishment is the one commonly referred to in the early Empire by the phrase *more maiorum*. I shall therefore speak of it as the *supplicium de more maiorum*.

The famous *lex horrendi carminis* of Livy i, 26, 6, will serve as our point of departure. The young Horatius has been haled before Tullus Hostilius, charged with the murder of his sister.¹ The king appoints duumvirs, their action to be regulated by the following *carmen*: duumviri perduellionem iudicent. si a duumviris provocarit, provocatione certato: si vincent, caput obnubito, infelici arbori reste suspendito, verberato vel intra pomerium vel extra pomerium.² As to

¹ The constitutional and legal features of the case do not seriously concern us. The older literature on the case is best collected and discussed by C. R. Köstlin: *Die Perduellio unter d. röm. Königen*, Tüb. 1841, esp. 59 ff., 79 ff., 85 ff.; and W. Rein: *Das Criminalrecht d. Römer*, Lpzg. 1844, 470. The discussion in the following handbooks is also valuable — A. W. Zumpt: *D. Criminalrecht d. röm. Rep.*, Berl. 1865, I, 1, 88–99, 1, 2, 327 ff.; L. Lange: *Röm. Alt.*³, Berl. 1876, I, 328 ff.; J. N. Madvig: *Die Verf. u. Verw. d. röm. St.*, Lpzg. 1882, II, 274; A. Bouché-Leclercq: *Manuel des Inst. rom.*, Par. 1886, 90; Th. Mommsen: *Röm. Str.*³, Lpzg. 1887, 615, and *Röm. Strafrecht*, Lpzg. 1899, 154 f., 167³, 528¹, 587 f. The best treatment of the case is by J. Baron: *Commentatio ad causam Horatianam*, Berl. 1870. His view is undoubtedly correct that, whereas the crime was certainly *parricidium* (cf. Festus, *sororium tigillum*), the “clemency” of Tullius (Liv. I, 26, 8) consisted in his treating it as though it were *perduellio*, where the condemned had the right of appeal. With the theories of Pais, Soltau, and others about the ultimate origin of the Horatius legend we are, of course, not here concerned.

² The paralleltradition appears in Dionys. Hal. iii, 22, Festus, *sororium tigillum* (297 M.) and Ps.-Aurel. Vict. *de vir. illustr.* 4, but throws no light on our particular question. For Dionysios' treatment cf. the excellent remarks of Zumpt, *op. cit.*, I, 1, 90 f. The only external check on the integrity of the *carmen* is Cicero's quotation in § 13 of the speech *pro C. Rab. perd. reo*, which, however,

the antiquity of the *carmen* we may observe that *provocatio* was formally recognized *ab omni iudicio poenaeque* by the laws of the Twelve Tables.¹ This formula, which served as precedent for such *provocationes*, and is here applicable only in the case of *perduellio*, where the appeal was probably first employed,² must antedate that legislation by a very considerable

makes no attempt at completeness. Internally considered the formula in Livy seems complete and harmonious. Mr. Reid, quoted in W. E. Heitland's ed. of Cicero's speech *p. Rab.* (Cambr. 1882, 3³), thinks the last clause an anachronism at the time of establishing the precedent. It is, however, a sacral rather than a constitutional proviso. Many penalties were restricted, it would seem, to the *campus sceleratus* at the Colline gate, the Campus Martius, the forum, the Esquiline hill, etc. For this punishment, as the case might often demand quick action, no limitations of place are specified. Cf. Mommsen, *Strafr.*, 913. Mr. Heitland's own objection on the Duumvirs is really directed against Livy's interpretation, not the *carmen*. Livy's direct source is not discoverable, but the *libri pontificii* were certainly the ultimate source, as is clear from Cic. *de Rep.* ii, 54. Cf. A. Schwegler: *Röm. Gesch.*, Tüb. 1853, I, 594; Lange, *op. cit.* I, 382; J. F. Seely, *Livy*, Book I, pref. p. 43, and on I, 26, 9; E. Brunnenmeister: *D. Tödlungsverbr. im altröm. Recht*, Lpzg. 1887, 114⁶, 210²; von Premerstein: *Commentarii*, P.-W. IV, 728. The objection of T. H. Dyer, *Hist. of the Kings of Rome*, Phil. 1867, 196, is trifling. Cicero's statement (*pro. C. Rab. perd.* 15) that Labienus drew his precedents *ex annalium monumentis atque ex regum commentariis*, referring directly to this *carmen*, merely strengthens our conclusions. *Annalium monumenta* is the vaguest kind of an expression, while the *regum commentarii* agree so often exactly in form and content with the *libri pontificii* and the *ensoriae tabellae*, that their source is unquestionable, whether, as Mommsen thought, the *reg. comm.* were merely a designation for "die pontifikale Sakralordnung überhaupt," or, as seems more probable, they were a late forgery pieced together out of fragments of genuine tradition. W. Soltau's recent handling of the Horatius legend (*W. Kl. Ph.* 1908, 1269 ff.) is plausible, but I cannot believe that a mere drama of Ennius could have so imposed on the pontifices that they set the precedent for *provocatio* in the regal period without any confirmatory evidence. In any event the *carmen* is genuine; it could not have been invented by Ennius, and whether the case to which it is attached belongs to the regal period or not, it surely antedated the legislation of the XII Tables as appears below.

One point in the story, the use of the *iugum* (elsewhere employed only for captured enemies), deserves attention. Dionysios connects it with the purification (τοῖς τε ἄλλοις καθαρμοῖς ἐχρήσαντο, καὶ τελευτῶντες ὑπήγαγον τὸν Ὀράτιον ὑπὸ ζυγόν), thereby confirming Mr. Frazer's brilliant conjecture (*Golden Bough*³, II, 406 ff.) supported by a mass of testimony from other peoples, that the idea back of the Roman use of the *iugum* was "to strip the foe of his malignant and hostile powers before dismissing him." In Horatius' case it was used unquestionably to cleanse from the stain of a kinsman's blood.

¹ Cic. *de Rep.* ii, 54, Bruns, *Fontes*⁶, no. 5 inc. sedis.

² cf. Baron, *op. cit.* n. 1.

period of time. There is indeed no reason to question Cicero's declaration *provocationem . . . etiam a regibus fuisse*.¹

Regarding now its interpretation, many scholars, emphasizing the phrase *infelici arbori veste suspendito*, have thought that hanging was meant.² This view is, however, untenable from the following considerations. In the first place the order of the different stages in the execution is (1) veiling the head, (2) hanging or fastening to a tree, (3) scourging; and it is interesting to note that a few paragraphs further on, where the young man's father delivers an impassioned speech in his son's behalf, precisely the same order is followed. Now few things could be more absurd than to begin the scourging of a criminal only after the body was dangling from a noose at some distance from the ground. The blows would necessarily be ineffective, and the culprit dead before he had suffered seriously. To be sure this very obvious objection is met by many with the assertion that the scourging is mentioned merely "als Nebensache nach der Hinrichtung" — to use the words of Moritz Müller.³ This interpretation is forced and improbable. No similar hysteron-proteron has been cited as a parallel,⁴ and it is very doubtful if one can be

¹ No weight can be laid on the assignment of the precedent to Tullus Hostilius. The grounds were probably only too slight, when any existed at all, for assigning an institution to any individual king. Cicero (*p. Rab.* 12) speaks of these *cruciatu carmina* as the invention of Tarquin, *superbissimi atque crudelissimi regis*, but that is mere rhetoric. All cruel punishments were summed up as inventions of Tarquin. Cf. Suet. *de Regibus*, frg. 178, and the later tradition dependent upon him, collected there by Reifferscheid.

² For example, Niebuhr, *Röm. Gesch.*⁴ Berl. 1833, I, 365; Köstlin, *op. cit.* 125; Rein, *op. cit.* 472; Dyer, *op. cit.* 175; E. C. Clark: *Early Roman Law*, Lond. 1872, 61; Ph. Degen, *Das Kreuz als Strafwerkzeug u. Strafe der Alten*, Aachen, 1873-4, 22; H. Fulda, *Das Kreuz u. d. Kreuzigung*, Bresl. 1878, 55; C. Peter, *Gesch. Roms*⁴, Halle, 1881, I, 29; K. Tücking ed. Book i², 1887, *ad loc.*; M. Müller, ed.², 1888, *ad loc.*; A. H. Greenidge, *Roman Publ. Life*, Lond. 1901, 8 (cf. 106); Forcellini, and Lewis and Short, in their lexicons *s.v.*, *et al.*

³ *L.c.* So also Weissenborn-Müller ed.⁸, 1885, though interpreting the punishment as crucifixion.

⁴ To be sure Mommsen, *Strafrecht*, 938⁸, cites the *provocatio* formula as — necare et verberare — insisting at the same time that a single punishment, scourging followed by execution, was meant (42⁴). In this last assertion he is clearly wrong, and the form in which he quotes the formula is not accurate. It reads in Cic. *de Rep.* ii, 54 necaret neve verberaret, in Val. Max. iv, I, I verberare

found in Roman Law, for if any branch of literature was uninfluenced by rhetorical considerations, certainly it was the legal codes and formulas. But such an arrangement is not even rhetorically effective. The essential element in the punishment would thus occupy the position of *least* emphasis, being neither first nor last. And more than that, in the impassioned speech of the father later on in the chapter, not only is the same order observed as in the carmen, but precisely the scourging is singled out as the most atrocious feature of the punishment.¹ The burden of proof is clearly upon those who assume an inversion here, and until satisfactory reasons are adduced for the change from the natural order, and exact parallels cited, we are justified in rejecting this explanation.²

Again, it is certain that *suspendere* even when used to describe corporal punishment does not necessarily mean hanging by the neck. So Nymphodorus of Aetna was *suspensus in oleastro quodam* during the régime of Verres,³ and though he remained there a long time, he escaped finally with his life; Ammianus in telling how a mutinous soldier, Petrus Valvomeres, was fastened to a whipping-post and scourged, uses these words: *post terga manibus vinctis suspendi praecipit* (Marcus),⁴ and then goes on to relate how the culprit survived and met his death finally some other way; and Ausonius describes Amor as *in excelso suspensum stipite*,⁵ though he was merely bound to the tree by tendrils and

aut necare. So Livy (x, 9, 5) says the lex Porcia provided for a penalty, — *si quis verberasset necassetve civem Romanum*. So the phrase in Cic. *l.c.* 62 *contra necem ac verbera* must be interpreted in the light of these parallels, and not as a hysteron-proteron. Among a people like the Roman, with a highly developed sense of personal dignity, it is perfectly natural that the *provocatio* to the people might have been employed to save one from the infamy of the scourge.

¹ § 11 *huncine, quem modo decoratum ovantemque victoria incedentem vidistis, Quirites, eum sub furca vinctum inter verbera et cruciatus videre potestis?*

² So certain was Lipsius, *De Cruce*, 2, 2 (1592, cited by the ed. of the *Opera*, Vesaliae, 1675, vol. III), that crucifixion was intended that he unconsciously changed the order of the very formula: *horrendum carmen diserte canebat: Verbera intra aut extra pomerium: et tum denique succinebat: arbori infelici suspendito (!)*.

³ Cic. *in Ver.* iii, 57.

⁴ xv, 7, 4.

⁵ *Cupido cruciatur*, 59.

creeping plants. A not uncommon meaning of *suspendere* is "rest upon," and it is attested for all periods of the language,¹ while such an interpretation of the word in this connection is singularly sustained by a gloss of Nonius on the very phrase in the carmen as quoted by Cicero.² It is to this effect: *suspensum dicitur alte ligatum*: M. Tullius in Verrem (sic) *arbori infelici suspendito*. It is obvious then that the technical meaning of the phrase here is not "hang from" but "fasten to" a tree.³ This view is in strict accord with the rare use of the locative *arbori*, the only example of this form in the language,⁴ instead of the ablative with or without preposition, which is the only construction with *suspendere* in the sense of "hang from."⁵ Taken strictly the phrase

¹ cf. Livy xxxviii, 7, 9 *suspensio fulturis ab hostibus muro*; Verg. *Aen.* viii, 190 *saxis suspensam hanc aspice rupem*; Pliny, xxxiii, 21 *tellus ligneis columnis suspenditur*; Quintilian xi, 3, 125 *dexter (pes) . . . summis digitis suspenditur*; Florus, iii, 5, 16 *nuntius . . . utre suspensus et pedibus iter gubernans . . . evaserat*; Oros. vi, 2, 14—of the same incident—*duobus utribus suspensus . . . vii milia transmeavit*; an exact parallel is Claudian *in Ruf.* iii, 282 *Illum (Perseum) vilis amor suspensae virginis (Andromedae) egit*. Other passages as conclusive, though not more striking, are Cic. *frag. philos.* 5, 76; Sen. *Ep.* 41, 3; Columella, xii, 18; Lucan, iii, 396; Sil. Ital. iii, 556; xii, 532; Pliny, xvi, 156, and cf. Gronov's excellent note on Sen. *Ep.* 84, 12.

² The note may be derived from the Commentaries of Asconius. The oration dates from the period 65–52, within which fall all the orations we know Asconius worked on, and it offered a tempting field for an antiquarian. The form of the quotation, *suspensum*, not *suspendito*, makes it not impossible that Asconius had cited, as parallel, the XII Tab. law against the harvest thief—*suspensum Cereri necari*, tab. 8, 8 (Bruns⁶), and glossed the quotation. Nonius seems to have read the *pro Rabirio* as he cites it by this title, p. 51, 27 s.v. *lictoris*. The words *in Verrem*, however, might indicate that the citation was from a cross reference in a commentary on Cic. *in Ver.* ii, 57 where the word *suspendi* does occur. Quicherat's suggestion that the citation of this passage from the Verrines has fallen out of the text of Nonius does not seem very plausible.

³ In the sense, of course, that the tree bears the weight, and that the feet do not touch the ground. This is evidently all that *alte* in the gloss means, and an exact parallel is that slight suspension above the ground implied in the familiar phrase of comedy *plectar pendens*.

⁴ cf. Weissenborn-Müller⁸ *ad loc.*, and Neue-Wagener,³ II, 650. This form is not cited in the *Thesaurus*, nor can I find any reference to the passage at all.

⁵ The passages I have found with *in* and the ablative, the equivalent of the locative, bear out this idea. They are the two cited above in the text from Cicero and Ausonius, and Juvenal, 6, 437 *in trutina suspendit Homerum*. The obscure phrase *in furca suspendere* of the *Dig.* xlviii, 13, 6 demands a word of explana-

should mean, "hang or fasten him with a rope *on* (or *to*) a tree," not, "*from* a tree," and we have no reason to believe that the author of the formula did not use language exactly.¹

There are furthermore general considerations of great weight against the interpretation of hanging. There is not a particle of evidence that the Romans ever hanged criminals from a gallows. To be sure they were frequently enough strangled in prison, but this seems to have been done in their cells, and the phrases used² distinctly imply suffocation by throttling and not by hanging. But even this practice is comparatively late, the first certain case being the strangling of Aristonikos, in 129 or 128 (Eutrop. iv, 20, 2; Oros. v, 10, 5), then that of the followers of C. Gracchus in 121.³

tion. As is well known, *furca* supplanted *crux* in the *Digest* after the abolition of crucifixion by Constantine (Aurel. Vict. 41, 4; Sozomen, i, 8), as in such passages — *latrones . . . furca figendos* (xlviii, 19, 28, 15), *auctores seditionum . . . in furcam tolluntur* (xlviii, 19, 38, 2), etc., and it would seem that some form of strangulation by suspension was introduced. Lipsius (*op. cit.* 3, 7) and Fulda (*op. cit.* 119) think that Isidore's description: *patibulum vulgo furca dicitur . . . suspensum enim et strangulatum ex eo exanimat . . . patibulum appensos statim exanimat*, means hanging by a rope around the neck. The odd use of *appensos*, however, makes much more probable E. Saglio's suggestion [art. *crux*, Dar. and Sag. *Dict.* I, 1574, after Garrucci], that a real *furca* was used in shape of a capital Y, the victim's neck being caught in the fork, and held there by a rod passing across the arms.

¹ The expression *laqueum iniciabat* (§ 7) has nothing to do with hanging. The lictor was merely putting on the handcuffs as it were; cf. Mommsen, *Strafr.* 919⁷, and in addition to the passages in Harper's *Lex.*, Isid. iv, 27, 8 *pedicae sunt laquei quibus pedes illaqueantur*.

² Suffocare, strangulare, laqueo gulam frangere, cervicem frangere, guttur frangere, fauces elidere, etc.

³ Appian, *B. C.* i, 26. Instances of private execution by state officials of course antedate these, but there is no evidence that in these cases the victim was strangled, and even here the earliest recorded instance is that of M. Claudius in 236 (Val. Max. vi, 3, 3). A little earlier is the very doubtful case of Publicia and Licinia, who were strangled by their relatives according to Val. Max. vi, 3, 8, in the year 154, though Livy, *Per.* xlviii, says merely *necatæ sunt*. This was, however, not an official execution. The novellistic account of the final fortunes of Perseus, the last king of Macedonia, in Diod. xxxi, 15 relates how when he was in prison *ἐρριπτο δ' αὐτῷ καὶ ξίφος πρὸς ἀναίρεσιν καὶ κάλως πρὸς ἀγχόνην, ἐξουσίας διδομένης ὡς βούλοίτο χρῆσασθαι*. Even if this story be true, the act was doubtless one of private initiative, and had Perseus taken the hint his death would have been a suicide and not an execution. Zumpt, *op. cit.* I, 2, 397, asserts that this suffocation in prison was as old as the XII Tables, but cites no evidence for his view.

Against the objection which might be raised that this case of Horatius belongs to an immemorably ancient past, and that such an argument from later usage is therefore inconclusive, can be urged the striking fact that in the *libri pontificii* there lay from ancient times a taboo against any person *qui laqueo vitam finisset*, with the severe penalty *ut insepultus abiceretur*.¹ Now this taboo was so old that by the time of Cassius Hemina its origin had been forgotten and a preposterous *alría* invented to explain it, while it is obvious that no state would officially sin against a sacred ordinance of the national religion.²

¹ Servius in Verg. *Aen.* xii, 603, apparently on the authority of Cassius Hemina and Varro: *cautum fuerat in pontificaiibus libris* (P. Preibisch: *Frsgg. Librorum Pontif.*, Tilsit, 1876, p. 13, no. 57), *ut qui laqueo vitam finisset, insepultus abiceretur*, etc. . . . Cassius autem Hemina (C. Peter: *H. R. F.*² 1883, p. 70, frg. 15) ait, Tarquinius Superbum cum cloacas populum facere coegisset, et ob hanc iniuriam multi se suspendio necarent, iussisse corpora eorum cruci affigi. tunc primum turpe habitum est mortem sibi consciscere, et Varro ait, suspendiosis, quibus iusta fieri ius non sit, etc.

² To be sure, hanging was quite the classical way to commit suicide, and scores of cases might be cited of its use; but desperate human nature has always employed means of effacing itself more gruesome than the ordinary penalties of civilized communities ancient or modern.

It is interesting to consider the origin of such a taboo. I should like to offer tentatively the following explanation. It is an almost universal belief among primitive folk that the soul dwells in the breath or in the blood, or in both. [For many savage tribes cf. Tylor: *Prim. Culture*², I (1874), 432 f., and for a very large list of examples J. G. Frazer: *Golden Bough*² (1900), I, 251 ff., II, 56 ff., and 394; for the Arabs, Robertson Smith: *Rel. of the Semites*² (1894), 40¹; the Hebrews, the familiar 'breath of nostrils,' and 'breath of life'; the Hellenes, Rohde's classic discussion, *Psyche* (1894), 3 f., cf. 483¹, 556, 609³, 622³, etc.; E. Bethe, *R. M. LXII* (1907), p. 461 f.; the Germans, E. Mogk, Paul's *Grundriss*², III (1900), 254, etc.] Nowhere was this belief held more seriously than among the Romans. [Cf. the custom of sucking in the soul of the dying as it escapes on their last breath. A full collection of the evidence for this seems not to have been made, though it is often referred to. The passages I have noted are Cic. *in Ver.* v, 118; Verg. *Aen.* iv, 684-5, and Servius *ad loc.*; Ovid, *Met.* vii, 680-1; xii, 424-5; *Auct. Consol. ad Liviam*, 97 and 158; Statius, *Silvae*, v, I, 195; Justin, 33, 4. The final kiss before burial was probably a modification of this usage, for which cf. Statius, *Silv.* ii, I, 173, and *Theb.* xii, 417. Cf. also such expressions as, *anima in naso esse, stabam tanquam mortuus* (Petron. 62), and, *in primis labris animam habere* (Sen. *N. Quaest.* iii, praef. 16). For parallels cf. Frazer, *op. cit.* II, 56 ff.] Natural death ensues, therefore, when the soul escapes through the blood or on the breath.

An equally large number of scholars think that crucifixion is the penalty described in the carmen.¹ This view is also, I

Death by strangulation, however, when no blood is shed and the vital breath is prevented from leaving the body may well have seemed peculiarly uncanny to Roman instinct, and always was, as a matter of fact, held in special aversion. [Pliny, cf. below, calls it a *poena praepostera*. Lat. Pacatus, *Paneg. Theod.* c. 28, speaks of the *femineae mortis infamia*. Ps. Aur. Vict. *Ep.* 40, 5 calls it a *mortis genus postremum*. In the later Empire it was specifically forbidden — Ulp. *Dig.* xlviii, 19, 8, 1 — and employed only very rarely.] Numerous parallels among other nations for such scruples against leaving blood in a dead body exist [See Frazer, *op. cit.* 1, 353. For the Roman feeling about life being in the blood, cf. Verg. *Aen.* x, 487 *una eademque via sanguis animusque sequuntur*, and Serv. in Verg. *Aen.* v, 79 in quo (sc. sanguine) est sedes animae, and iii, 67 *sanguis enim velut animae possessio est, unde exsanguis mortui dicuntur*, on the other hand Oros. iii, 2, 8 — (Epaminondas) *remota manu, qua vulnus occluserat, egressum sanguinis ac mortis patefecit introitum* — is mere rhetoric], and a striking passage in Pliny (ii, 156) where he calls strangling a *poena praepostera* because of the *inclusus spiritus, cui quaereretur exitus* (cf. for the phrase *inclusus spiritus* Val. Max. ix, 12, 7), makes natural the inference that the same scruples existed at Rome against shutting up the breath of life in the body. Be that as it may, however, it remains true that the Romans never hanged criminals by the neck. This seems rather to have been a northern institution. It was from the earliest times practised by the Germanic peoples [cf. Tacitus, *Germ.* 12, 3; W. E. Wilda: *Strafr. d. Germ.* (1842) 500 ff.; J. Grimm: *Deutsche Rechtsalt.*⁴ (1899), II, 257; F. B. Gummere: *Germ. Orig.* (1892) 239 ff. It was the common form of sacrifice to Odin, who hanged himself on such a tree. See Frazer: *Adonis, Attis, Osiris*² (1907), 244. So at the sacred grove of Upsala victims were hanged upon trees, Adam of Bremen, Migne, CXLVI, 643. The Cimbri and Teutones so treated their Roman captives, Oros. v, 16, 6. For Hellenic and other parallels to this form of sacrifice, cf. further Dümmler: *Philol.* LVI (1897), 29, A. 41; Frazer: *Ad. Att. Os.* 244; M. P. Nilsson: *Griech. Feste* (1906), 234]. It seems to have been introduced into Hellas by the Macedonians. See H. Thalheim: *Gr. Rechtsalt.*⁴ (1895) p. 141. Sporadic cases not considered by Th. are the hanging of the faithless maids by Odysseus, *χ*, 465 ff., on which see the brilliant note by Murray: *Rise of the Gk. Epic* (1907), p. 118 f., and the lynching of the daughters of Dionysios II, by the Lokrians, who deflowered, strangled, and burned the girls, and then scattered their ashes, Strabo, vi, 1, 8 (260); this may have been a Lokrian usage, as a fairly well attested law of Zaleukos ordered every legislative innovator to present his case with a *βρόχος* about his neck — Dem. 24, 139; Polyb. xii, 16, 10,

¹ For example Turnebus: *Advers.* 4, 3; Lipsius, *op. cit.* 1, 2; II, etc.; Weissenborn-Müller, ed.⁸ (1885) *ad loc.*; Greenough, ed. (1890); Lord, ed. 1896; E. Coccia, ed.² (1900); C. Bötticher: *Baumkultus* (1856), 305; P. Daude: *De cap. poen. iure Justin.* (1871), 58; Ph. E. Huschke: *Die Multa und das Sacramentum* (1882), 190; E. Caillemer: art. *crux*, Dar. and Sag. *Dict.* 1, 1573; Mommsen *op. cit.* 915⁵, et al.

believe, untenable, because of the following considerations. The covering of the head before execution is unparalleled in the many cases of crucifixion known to us.¹ Instances are furthermore numerous where the dying man talked or preached, cursed or prayed upon the cross, all of which would have been impossible with a sack over his head.² Equally significant is the word *reste*. It is often stated that the criminal might be bound with cords to the cross as well as nailed.³ Many passages have been cited to establish the use of ropes, but with two exceptions they either prove nothing or have been completely misunderstood.⁴ The two passages are first, Pliny,

etc. κρεμάννυμι does not, however, always mean hang, as Th. assumes. The lexica are useless here, and I have to fall back on scattered reading, but absolutely certain cases where it means crucify, are Joseph. *B. J.* vii, 6, 4; Plut. *Kleom.* 38 (cf. 39); *id. Caesar*, 2; Eusebios, v, 1, 14. Probable cases are Arrian, *Anab.* vi, 17, 2 (cf. Curtius, ix, 8, 17); Diod. xvii, 46 (cf. Curtius, iv, 4, 17), and Suid. *s.v.* † Ἰλλοῦστρον. In at least one case the word seems to mean no more than hang up for a beating, like a certain usage of *suspendere*—i.e., in the letter of an Antiochos cited by Athenaios, xii, 547 f. It need hardly be said that Pollux, viii, 71, and the confused statements of the Paroemiographers on τὰ τρία τῶν εἰς θάνατον, as well as Suid. *εἴποις τὰ τρία* κτλ. and Schol. Aristoph. *Ran.* 641, prove nothing for pre-Macedonian times. A case where a Thracian hanged captives appears in Diod. xxxiii, 18.

¹ Fulda, 143 f. (following Lipsius's note on 2, 2—p. 1223, ed. of 1675), argues from the uncertain case of Haman in *Esther* 7, 8. This was, however, only at the arrest, while much of the infamy of the execution is lost if the face is covered. Fulda's appeal to Cic. *in Ver.* v, 72, is futile, as a careful reading of the passage shows that decapitation was the punishment here, not crucifixion. The only even similar cases known to me are the execution of Achaïos (Polyb. viii, 23, 3), where the head was cut off and sewed up in the hide of an ass, and the trunk fastened on a cross, and that of Kleomenes (Plut. *Kleom.* 38 and 39), where the body was sewed up in an ass's hide and crucified, while the head was exposed. But neither of these cases is an ordinary crucifixion, as only a corpse was mishandled, while the use of the ass's hide is a mere insult, and has nothing to do with the *obductio capitis*.

² So the case of Jesus; of Bomilcar at Carthage (Justin, xxii, 7, 9) in 308; of St. Andrew (*Martyrol.* 30 Nov.) and of Terentius and Maura (3 May), though we may well doubt that they survived nine days; some spat on the onlookers (Sen. *de Vita Beata*, 19); and Verres had the unfortunate Gavius crucified at a point where he could look across the strait into Italy (Cic. *in Ver.* v, 169–170).

³ So, for example, Lipsius, 2, 8; Fulda, 152 ff., 266 ff.; Marquardt: *Privatl.*² 187; Becker-Göll: *Gallus* II, 181; Hitzig, art. *crux*, P.-W. IV, 1731.

⁴ e.g. (1) Lucan, *Pharsalia*, vi, 543, . . . laqueum nodosque nocentis | ore rupit suo: pendentia corpora carpsit, | abrasitque cruces. This is taken to prove ropes

N. H. xxviii, 46, where he speaks of the magical powers of nails from a cross and of *spartum e cruce*. There is nothing said, however, as to how this rope was used. It may have

by Degen, 32, and Fulda, 266 f., but a glance shows that in 543 only persons hanging by a rope are meant, and in 544 only the crucified. The Schol. long ago could have settled the case, — sic ubi *aut* laqueo aliquis obiit *aut* cruce, etc. (2) Auson. *Cup. cruc.* 59 ff. Huius in excelso suspensum stipite Amorem | devinctum post terga manus substrictaque plantis | vincula maerentem multo moderamine poenae | adficiunt, etc. It seems almost incredible that Lipsius, 2, 8, should have argued from this for ordinary crucifixion. The poor ghosts in Hades used only what came first to hand; there was no opportunity for regular crucifixion. (3) Artemid. *Oneirokr.* ii, 53, that the dream of a cross ἀνδρὶ δὲ ἀγάμψ γάμουν προαγορεύει διὰ τὴν δέσιν, is treated as evidence by Lipsius, *l.c.* Yet δέσις and δέω do not mean “bind” alone; cf. Nonnos, *Paraphr.* 19, 103, of the two thieves: κέντροις ἀντιτύποισιν ἐπὶ σταυροῦ δεθέντες. Artemid. himself in the same section, comparing ships and crosses, observes, καὶ γὰρ ἐκ ξύλων καὶ ἡλων γέγονεν ὁ σταυρός; had ropes been in common use at the time, he could hardly have failed to mention them, as they would help his point greatly. (4) Fulda, 310, takes Hdt. vii, 194, where ἔλυσε is used of a man taken down from a cross, as further evidence. This scarcely deserves mention, certainly not refutation. (5) Fulda, 268, so interprets Cic. *in Ver.* v, 10–12, but falsely, as *alligantur* and *alligati* are used not of affixing to the cross, but of fastening to the *palus* for the preliminary scourging; cf. Cic. *ib.* 121; Livy, ii, 5, 6 and 8; viii, 7, 20, etc. (6) Lipsius (note on 2, 5, p. 1224) argues from Jesus’ words to Peter, John 21, 18 καὶ ἄλλος σε ζώσει, for binding. To be sure, the Fathers generally interpreted the passage of crucifixion, but there is no direct evidence that this was meant, and the moment spoken of is clearly that of the arrest (cf. καὶ οἴσει ὅπου οὐ θέλεις), and not of the execution. (7) Degen, 32, and Fulda, 278, use also Hilary, *de Trinitate*, x, 13 (Migne, x, 352 A), where the body of Jesus is thus described: sed forte penduli in cruce corporis poenae, et colligantium funium violenta vincula et adactorum clavorum cruda vulnera sunt timori: et videamus cuius corporis homo Christus sit, ut in suspensam et nodatam et transfossam carnem dolor invaserit. Hilary is here describing the physical sufferings of Jesus. The tightly bound ropes, from which he suffered at arrest and during the scourging, are mentioned along with the nails. It is certainly forcing the passage unduly to infer that these ropes were upon him at the very time he was on the cross. (8) Farrar (*art. crux* in Smith-Hackett’s *Dict. of the Bible*, i, 510, 513) cites as evidence the use of *ligare*, *alligare*, *deligare* for crucifixion. But in classical times these words are never used, to my knowledge, of crucifixion, but only of fastening to the *palus* for the preliminary scourging (Cic. *in Ver.* v, 161, etc.; cf. above, under 5), while the historian Licinius (*H. R. F.*² no. 3 from Nonius, 221, 11) distinguishes between the technical terms for fastening to the patibulum and to the cross thus: ad patibulum deligantur, cruci defiguntur. For the mention of ropes in Christian Martyrologies, see below, p. 59, n. 3. (9) Lipsius, 3, 8, interprets Ammian. xxii, 11, 9 of the death of Dracontius and Diodorus in xxxvi, 2 *iniecitis per crura funibus simul exanimati sunt* of crucifixion. It has certainly nothing to do with it; the

been used in tying the cross-beam to the upright, or hanging the cross-beam over the top of the upright, or in hoisting the criminal to his position on the cross.¹ Nails, however, are also mentioned here, so the passage is at best inconclusive. The other is in the *Ephesiaka* of Xenophon of Ephesus (iv, 2, 3), where it is observed that the hero Habrokomes was tied to the cross by the Egyptians, and the explanation immediately appended *τοῦτο γὰρ τῆς ἀνασταυρώσεως ἔθος τοῖς ἐκεῖ*.² No stronger proof could be given that ropes were not used elsewhere in the Graeco-Roman world at the time, and so presumably never before.³ Very significant is Cicero's omission of the word *reste* in his quotation of the formula in the speech *pro C. Rabirio perd.* 13. Cicero's purpose is to discredit his opponent Labienus by showing that he intended to crucify a Roman citizen. He does not hesitate to misstate facts and throw dust in the judges' eyes to a degree remarkable even for him, in this oration, and scholars are agreed that his unsupported authority as to the facts of this case is slight indeed. I am convinced that any one who takes the trouble to read the speech will admit that Cicero has garbled the formula by omitting the one word *reste* which itself would have shown his audience that crucifixion could hardly have been intended.⁴

Another difficulty is the use of *suspendere*. It is not a *terminus technicus* for crucifixion, and indeed with the exception of ankles were pierced and the men hung up to die, or more probably dragged to death, as Hector. Cf. for this latter form Curt. Rufus, iv, 6, 29 of Betis at Gaza. *Iniecti* in Ammianus is apparently for *traiecti*, which appears here in Curtius.

¹ So especially Humbert (Dar. and Sag. *Dict.* 1, 1572) and Canney (Cheyne and Black's *Encycl. Bibl.* 1, 959).

² This has been strongly emphasized by J. Stockbauer: *Die Kunstgesch. d. Kreuzes* (Schaffh. 1870), 12, and Degen, 10 and 32; Fulda, 310 f., objects to the inference, but unsuccessfully.

³ Occasional instances of crucifixion by means of ropes do occur in the Christ. Martyrologies (e.g. St. Andrew, Nov. 30, Migne xciv, 1119; Anastasia, Dec. 25, *ib.* 1141, etc.), but these examples are very late; the ropes were used for the express purpose of prolonging the suffering, and unsupported these cases cannot be used to determine the usage in classical times. Cf. W. Wayte in Smith's *Dict. of Antiq.* 1, 568. Even Fulda completely rejects evidence from these sources. Cf. 70 ff.

⁴ See below, p. 64 f., for a fuller discussion of this point.

tion of a verse in Ovid's *Ibis* and two very indefinite references in Seneca, it does not occur at all before Tertullian.¹ It would be surprising, to say the least, therefore, to find it used as the technical expression in an early law, which in the ordinary course of events would have determined subsequent usage. This might under pressure be allowed to pass, however, but the last clause is conclusive: *verberato vel intra pomerium vel extra pomerium*. In all known cases of crucifixion, scourging preceded fixing to the cross. To scourge the culprit afterwards would be almost as futile as to scourge a man when hanging by the neck. As this point has already been handled in some measure above, it need not be pressed further here. It is significant that Cicero omits this clause of the formula also when quoting it.

There are, furthermore, general considerations of great weight bearing against the interpretation of crucifixion. In the first place, crucifixion was preëminently the *supplicium servile*.² This is thoroughly attested from every period of

¹ The regular expressions are *agere, figere, affigere, defigere, suffigere, tollere*, and occasionally *dare* and *ferre*. Rarely of the criminal, *ascendere, excurrere, salire*. The only uses of *suspendere* known to me are: Ovid, *Ibis*, 298 *More vel intereas capti suspensus Achaei*, where the reference is doubtless to the crucifixion of the headless corpse of Achaïos (No. 4, P.-W. 1, 1384, 71) in Polyb. viii, 23, 3. [Forcellini and Lewis and Short mistranslate the word]; Seneca, *Ep.* 7, 4 *Sed latrocinium fecit quis. Quid ergo meruit? ut suspendatur* (cf. *Dig.* xlviii, 19, 28, 15); and *Consol. ad Marc.* 20, 3 *Capite quidam conversos in terram suspendere*. The Latin Fathers use it freely, so Tertullian, *adv. Jud.* 10; Lactant. *Inst.* iv, 26, 34; Hilary, *de Trin.* x, 13 (above), etc. For the use of *furca suspendere* in the *Digest*, cf. above, p. 53, n. 5. Mommsen's remark (*Strafr.* 916^b), "*Suspendere* ist bei der Kreuzigung das Schlagwort," is surprising in view of the facts.

² The most striking passages in support of this statement, apart from the very numerous actual cases of the crucifixion of slaves, are: Cic. *in Ver.* v, 12 *servos . . . ad supplicium more maiorum traditos . . . damnatis crucem servis fixeras*, and 169 *servitutis extremo summoque supplicio*, and compare the sole defence of Gavius (170 f.), *civis Romanus sum*, paralleled by that of the Gallic provincial crucified by Galba (Suet. *Galba*, 9); Tac. *H.* iv, 11 *servili supplicio*, and ii, 72 *supplicium in servilem modum*; Val. Max. ii. 7, 12 *perpeccos servile supplicium*; Vulcac. *vita Avid. Cass.* 4, 6 *in crucem tolli servilique supplicio adfici*; Capitol. *vita Opil. Macrin.* 2, 2 *in crucem milites tulit et servili supplicio semper adfecit*; Lactant. *Inst.* iv, 26, 29 *infame genere supplicii, quod etiam homine libro, quamvis nocente, videatur indignum*; Arnob. *adv. Nat.* i, 36 *crucis supplicium, quod personis infame est vilibus*.

Roman history. Cicero's impassioned denunciations of the crucifixion of Roman citizens are familiar to all.¹ They are not only meaningless, but positively ridiculous, unless we assume that he appealed to a deep-seated abhorrence of such a punishment on the part of the average citizen. It would be extraordinary indeed to find crucifixion distinctly ordered by the most ancient formula and precedent for a crime relatively so common as *perduellio*. Again, we have no reason to believe that the Romans practised crucifixion or even were acquainted with it at the early date of this carmen. The suggestion of certain scholars that crucifixion was not Oriental in origin and that it was developed, if not originally, at least independently, at Rome, has no basis in fact.² To pass by all general statements of ancient writers bearing on this point, or the specific instances from legendary periods, we have absolutely certain evidence of its use in Persia during the reign of Darius from four passages in the Behistun inscription.³ The first clear case in the west is that of Poly-

¹ Esp. in *Ver.* v, 169 ff.; *pro C. Rab.* 10 ff., esp. 16.

² Frazer, *op. cit.* II, 25, note, doubts whether crucifixion was an Oriental institution. Rein, *op. cit.* 913; Wächter: *De crimine incendii*, followed by Daude, *op. cit.* 57, thinks the *crux* developed at Rome out of the *arbor infelix* of the carmen. On the other hand, the word *crux* is genuine Latin (cf. Walde s.v.). The Sanskrit and Hebrew etymologies that have been suggested (see Zestermann, *op. cit.*; Fulda, 56 and 112; W. W. Seymour, *The Cross in Trad., Hist., and Art* (1898), 104¹) are futile. *Crux*, however, is used in a wider sense than the mere *cross*; see below, p. 63, n. 2.

³ These are the paragraphs, § 32, II, 76, about Fravartis; § 32, II, 90 f., Citrantakhma; § 43, III, 52, Vahyazdata; § 50, III, 92, Arakha (acc. to King and Thompson: *The Sculp. and Inscr. of Behistun*, London, 1907). That the Persian expression, which is slightly ambiguous, must mean crucifixion has been settled by W. Foy (*K. Z.* xxxvii [1904], 529¹) from a comparison of the Susian or Elamitic version. The Babylonian version ("I raised him aloft on the wood") is unfortunately ambiguous, as is also § 153 of the code of Hammurabi, where the authorities are divided as to whether crucifixion or impaling is meant. The Jews seem not to have used the punishment. Haman's case, *Esther*, 7, 9 f., is interesting. The Hebrew expression is equivocal, but the Sept. in 7, 10 reads *σταυρωθήτω* (the only place in the O. T. where the verb or noun is used in this sense), and the *Apocr. Add.* 16, 18 *ἐσταυρωῖσθαι*. The commentators vary between "crucify," "impale," and "hang"—the latest, L. B. Paton (1908), thinking that the height of the "tree" (50 cubits, 5, 14) makes crucifixion or impaling impossible. Quite the contrary, a very high cross was sometimes made as a special aggravation

krates in 522,¹ then of certain persons in Barka about 510,² then of Artyaktes in 479,³ then of Inachos in Egypt in 455,⁴ and from that time on instances are numerous. In the far west the evidence is quite as complete. Examples are frequent from the crucifixion of Karthalo at Carthage about 550 on.⁵ Precisely opposite is the case at Rome. With the exception of two utterly discredited statements there is no recorded case of crucifixion before 217, when some twenty-five slaves were so punished for a conspiracy at Rome.⁶ This was only a few weeks after Hannibal had crucified an Italian guide, and most probably to retaliate against his severity. But in 208 the men of Salapia so treated certain captured renegades,⁷ in 201, after the fall of Carthage, Scipio crucified the Roman *perfugae*,⁸ and in 196 Flamininus jestingly

of the dishonor. Karthalo at Carthage (Justin. xviii, 7, 15) was raised *in altissimam crucem*, and Galba (Suet. *Galba*, 9) ordered for an unfaithful guardian *multo praeter ceteras altiore et dealbatam statui crucem*. In any case, the number 50 is doubtless a considerable exaggeration. Some confirmation of the view here proposed may be derived from the crucifixion of victims by the Jews as late as the fifth century A.D., probably at the feast of Purim (Frazer, *op. cit.* III, 172 ff.), with which this Haman execution was connected, and if so doubtless in imitation of the traditional form by which Haman was put to death. See Sokrates, *H. E.* vii, 16; Theophyl. *Chronogr.* I, 129 (Classen); *Codex Theod.* xvi, 8, 18.

¹ Hdt. iii, 125.

² *id.* iv, 202.

³ *id.* vii, 33, and ix, 120 and 122; cf. von Fritzsche on Aristoph. *Thesmoph.* 930. Instances where corpses were crucified, as those of Histiaios and Leonidas, or where the ambiguous word *ἀνασκολοπιζω* is used, are not counted.

⁴ Thuk. i, 110, 3.

⁵ Justin, xviii, 7, 150; Oros. iv, 6, 8, O. Melzer: *Gesch. d. Karthager* (1879), I, 161 f.; many Hellenes in 405 in Sicily (Diod. xiii, 111, 4), which provoked retaliation by Dionys. I in 397 (Diod. xiv, 53, 5); Hanno, *ca.* 368–345 (Justin, xxi, 4, 7, Melzer, I, 314 f.); Mago in 344 (Plut. *Timol.* 23, Melzer, I, 326); Bomilcar in 308 (Justin, xxii, 7, 8 f., Melzer, I, 394 f.); captives by Agathokles in 307 (Diod. xx, 55, 2, Melzer, I, 396), and later in the same year troops of Agathokles by the Carthaginians (Diod. *ib.* 69, 5); a Hanno in 264 (Polyb. i, 11, 5); a Hannibal in 259 (*ib.* 24, 6; Livy, Per. xvii); a Hasdrubal in 255 (Zonaras, viii, 14, Melzer, II, 317); many Numidian and Mauretanian chieftains *ca.* 255 (Oros. iv, 9, 9); many Carthaginians and mercenaries in 241–238 (Polyb. i, 79, 4; 86, 4 and 6; Dio I. xxv, 9); an Italian guide by Hannibal in 217 (Livy, xxii, 13, 9); the Suffetes of Gades in 206 (*id.* xxviii, 37, 2), etc. The list omits all uncertain cases, as, *e.g.*, the tales about Regulus or the Spanish chief killed by Hasdrubal, etc.

⁶ Livy, xxii, 23, 2. ⁷ Polyb. x, 33, 8. ⁸ Livy, xxx, 43, 13; Val. Max. ii, 7, 12.

threatened Alkios with the same punishment.¹ From this time on instances abound. Prior to this there is no authentic record of crucifixion at Rome.² The Twelve Tables specify several death penalties, but there is not a syllable about crucifixion, nor do any other legal fragments or traditions mention it. The only statements of any kind as to an earlier use are two. The first is a fragment of Cassius Hemina,³ in which he tells us that many Romans out of disgust at the servile tasks to which they were set by Tarquinius Superbus hanged themselves, and the tyrant

¹ Plut. *Flam.* 9.

² It is clearly transcending the evidence to assume, with Mommsen, *Strafr.* 919³, that Livy, iii, 18, 10, B.C. 294, refers to crucifixion: de captivis, ut quisque liber aut servus esset, suae fortunae a quoque sumptum est supplicium. Slaves were not ordinarily punished as freemen, but what form their punishment may have taken at this early period we cannot say. The only specific death penalty for a slave, according to the XII Tab., was — verberibus affici et e saxo praecipitari; this was for the *fur manifestus*. The fact that at a later time slaves were frequently crucified does not warrant us in assuming that punishment in the absence of any direct evidence. So in the famous case of the slave scourged under the *furca* at the Latin games of 489, the oldest form of the story as told by Fabius Pictor, Gellius, and Coelius, in Cicero (*de Div.* i. 55), by Livy (ii, 36), and by Macrob. (*Sat.* i, 11, 3) has not a word about the slave being put to death afterwards. This was in no case an essential element of the story, and certainly was not mentioned in the first annalistic record. On the other hand, the later (and more imaginative) authors speak of the death of the slave, Dionys. H. vii, 69 ἐπὶ τιμωρίᾳ θανάτου; Plut. *Coriol.* 24 εἰς ἀποκτείναι; Val. Max. i, 7, 4 ad supplicium; and so finally Lact. *Inst.* ii, 7, 20, and Arnob. vii, 39 (p. 244). No better case of the growth of a story in the telling could be found. The simple fact was that a slave had been scourged in the streets of Rome under a *furca*, no more and no less. There is utterly no evidence for crucifixion. It is surprising to see that Hitzig (P.-W. iv, 1730) cites Tert. *ad Nat.* i. 18 as connecting the cross with the Regulus legend. The comparison with *ad Mart.* 4 would have shown instantly that Tert. was using *crux* in the very broad sense of "torment," as, e.g., he calls the peaks on which Prometheus was bound *cruces Caucasorum* (*adv. Marc.* i, 1). This usage is common in Latin, as the lexica show. It went so far that Julius Bassus (in Seneca, *Controv.* i. 3, 4) called even the Tarpeian Rock *illa crux*. [To be sure, Seneca, Florus, and Silius Italicus — see E. Köser's collection of the literature in his diss. *De captivis Romanis* (1904), 77 ff. — would have it that Regulus was crucified, but the whole case is fictitious at best.]

³ See above, p. 55, n. 1. The same reappears in Pliny, xxxvi, 107. I conjecture that the earlier form of this story appears in the confused account of the invention of some strange punishment in Dio Cassius, frg. 11, 6 (Boiss.). See below p. 68, n. 9.

to deter others from following their example crucified the dead bodies, so from this time on it became a disgrace to commit suicide. The story, improbable and ridiculous in itself, must clearly be rejected *in toto* when we note first that it is an *αἰτία* to explain why the bodies of those who meet their death by strangulation might not be buried, and second because it is a preposterously inadequate *αἰτία* for the admitted fact of the religious taboo. The other case is a servile insurrection set by Dionysios in 501, on which occasion he says the captured slaves were crucified.¹ Now it is significant that Livy knows absolutely nothing about any such servile insurrection, and even the parallel annalistic tradition as it appears in Dio Cassius,² though giving all the essential details of the story, says of the slaves simply *ἔφθειραν*. It is obvious that even were this tradition well attested, which it is not, no recorder of any of the most ancient *Annales*, which were brief and pithy to an extraordinary degree, would have wasted his time in specifying the exact punishment meted out to a handful of mutinous slaves. Certainly no similar record has been saved for a space of nearly three hundred years that follow. The conclusion is inevitable that Dionysios in this passage was simply drawing upon his imagination — his first and most important source. There remains but the testimony of Cicero. He does indeed distinctly imply that this *carmen* provided for crucifixion, and he does so with the definite purpose of appealing to every Roman's prejudice against that penalty, to the confusion of the prosecutor Labienus. Throughout the whole oration his attitude is so shifty and misleading that his unsupported testimony is commonly admitted to be untrustworthy.³ We have already seen how he omitted significant

¹ v, 51 *ἀνεσκολοπίσθησαν ἅπαντες*. The earliest Latin version by Lapo Birago (Treviso, 1480) translates *e scopulo praecipitaverunt omnes*. This might cast some doubt on the correctness of the unanimous Mss tradition were not Birago's authority so weak. Glareanus (in the preface to his revision, Basel, 1532) swears he corrected 6000 errors of his! It is almost certain that Birago saw, or thought he saw, some compound of *σκόπελος* which he took as a synonym of *κατακρημνίζω*!

² Zonaras, vii, 13, 11 (Boiss.).

³ So hazy are Cicero's expressions that the very nature of the case is yet under dispute. See the extensive literature on the subject cited by Schanz², § 142, 4.

elements of the carmen telling against his interpretation, and in the light of his general treatment of the case these omissions must have been made of set purpose. We are therefore quite justified in rejecting his implication that the carmen describes crucifixion. These being the ascertained facts bearing on the case, there is no reasonable doubt but that the Romans learned to use crucifixion from their contact with the Carthaginians, and hence were unfamiliar with it prior to the beginning of the third century.¹

Severe criticisms on Cicero's chicanery are made by Heitland in his fine edition (1882), unfortunately too long to quote, in the Introd. pp. 36, 38, on §§ 10, 13, 17, 24, 36, and the Appendix, pp. 108 and 113. The conclusion of W. Wayte (Smith, I, 567) I thoroughly subscribe to: "Cicero who is arguing against the revival of the obsolete law of *perduellio*, and the capital punishment of citizens in any shape, is speaking rhetorically throughout: he quotes the formula without the word *reste*, a misleading and doubtless intentional omission, and talks vaguely of the cross (§§ 10, 11, 16) and of the detested Tarquin (§ 13). No historical conclusions can be drawn from a speech so obviously designed to confuse the questions at issue."

¹ A word should be said here about Mommsen's strange identification of crucifixion with the *more maiorum* punishment. To avoid any danger of misinterpretation, I give his own words as they appear in *Cosmopolis*, II (1896), 235 [the account in *Röm. Strafr.* 918f. is only a repetition of this]: "Die ordentliche Todesstrafe wurde jetzt die Kreuzigung, gleichzeitig für Freie wie für Sklaven, oder höchstens mit dem Unterschied, dass der Freie am Kreuz zu Tode gegeißelt ward, dem Sklaven aber mit geringer Bemühung des Henkers die Schenkel gebrochen wurden, oder auch man ihn am Kreuz verenden liess. Es gehört zu dem wunderlichsten Blüten der römischen Hoffartigkeit, dass diese Todesstrafe wenn sie an einem Bürger vollstreckt wird, Execution nach der Sitte der Väter (*more maiorum*), wenn an einem Sklaven oder Fremden, Kreuzigung heisst, ja man ungescheut die Kreuzigung bezeichnete als Sklaven-Hinrichtung (*supplicium servile*)."
This surprising view is for many reasons utterly untenable. The principal difficulty is, in a word, that it takes for granted Cicero's insinuated identification of the carmen with crucifixion, carries his implications to their logical conclusion, and totally disregards all other evidence. For example, there is nothing to show that the free citizen was scourged to death on the cross, nor is there a word about crucifixion in the cases (to be cited below) where it is certain that the *supplicium de more maiorum* was actually employed. In the two notorious cases where Roman citizens possessed of their full rights were crucified, those of Gavius (under Verres) and of the dishonest guardian (under Galba, see above), there is not a word about scourging to death, while both Cicero and Suetonius talk freely of the cross, and do not even mention the phrase *more maiorum* in connexion with it. In the other cases where Romans were crucified, they were either soldiers, traitors, or *perfugae*, or at least handled as such, therefore no longer possessed of the full rights of citizens; but even then there is not

Surely some other interpretation of this *carmen* is necessary. This I find in that punishment which under the early empire was euphemistically spoken of as being *more maiorum*. The best description of this is in Suetonius' account of the decree of the Senate relative to the deposed Nero (§ 49): *Nudi hominis cervicem inseri furcae, corpus virgis ad necem caedi*.¹ Some years earlier Claudius was inquisitive enough to go to Tibur to see some men executed by a *supplicium antiqui moris*, in which we are told simply that the culprits were *deligati ad palum* (Suet. 34). Again, Domitian had some persons condemned on the charge of *maiestas* to the punishment *more maiorum*, but later, *atrocitate poenae conterritus, intercessit* (Suet. 11). This is all the direct evidence on the form of the punishment, but Tacitus refers to it three times as *more maiorum*² and once as *more prisco*.³ It is very significant that of these seven cases in Suetonius and Tacitus, six are of *perduellio* or *maiestas*, the other (*Claud.* 34) being unspecified. The parallel between this punishment and the *carmen* of Livy is striking. The case was *perduellio*, the victim fastened to a tree or under a *furca* — as Livy paraphrases the formula (§ 10), the last act was scourging to death. The identification becomes more convincing when we collect other examples of the same punishment from an early period. They are briefly these: In the first place there are good reasons for believing that originally at Rome unfaithful Vestals were scourged to death.⁴ Nor were Vestals the only women that

a shred of evidence to show that the men were scourged to death. Many other considerations, all fatal to this theory, have been presented above in the text and notes.

¹ Repeated in Aurel. Vict. *Ep.* 5, 7 *ut more maiorum collo in furcam coniecto virgis ad necem caederetur*, and Eutrop. 7, 15, 1, who, however, fancifully adds the absurdity of hurling from the rock, *ut nudus per publicum ductus furca capiti eius inserta virgis usque ad necem caederetur atque ita praecipitaretur a saxo*.

² *A.* iv, 30, 1; xiv, 84, 4; xvi, 11, 6.

³ *ib.* ii, 32, 5.

⁴ This is distinctly stated to have been the usage according to the oldest law by Dionys. H. i, 78, and the statement is made the more probable from the circumstance that to a late date the only women that might be scourged at all were Vestals, and they by the Pontifex. Cf. Dionys. ii, 67; Plut. *Numa*, 10; Festus (106 M.) *virgines verberibus afficiebantur a pontifice*, and the cases mentioned by

so suffered, for tradition also had it that in the time of Romulus a certain Egn. Mecennius *uxorem*, quod vinum bibisset, fusti percussam interemit.¹ Be that as it may, however, it is certain that the seducers of Vestals were always so treated. After the first case, which is set for obvious reasons in the reign of Tarquinius Superbus,² instances follow in 470,³ 216,⁴ and finally under Domitian.⁵ In all the cases it is distinctly said the men were beaten to death with rods, and this form of punishment was specifically required according to the old law cited by Cato, which provided that the seducer of a Vestal *verberibus necaretur*.⁶

This was also the legally established punishment for *occenatio* in the legislation of the Twelve Tables. Cicero distinctly says the penalty was death, and Cornutus adds that the exact form was *fustibus feriretur*.⁷

In the semi-historical case of Sp. Cassius in 483 that tradition which represents him as condemned by his own father

Dionys. ix, 40 in 270 B.C.; Livy xxviii, 11, 6 and Val. Max. i, 1, 6 in 206 B.C.; Julius Obsequens, § 8, in 180 B.C.

¹ Val. Max. vi. 3, 9; Plin. xiv, 89; cf. Serv. in Verg. *Aen.* i, 737; Tert. *Apol.* 6. Yet of course not all places where the phrase *fuste ferire* appears need be interpreted in this way. For example in the case that came before M. Popilius Laenas, where a woman *matrem fuste percussam interemerat*, it is probable that the murder was committed by crushing the head with a club (Val. Max. viii, 1, Amb. 1). The execution of wife or child by the *pater familias*, however, was a quasi-legal action and so presumably according to recognized precedents.

² Dio Cassius in Zonaras, vii, 8 (Boiss.) οἱ δὲ ταύτας αἰσχύναντες εἰς ξύλον τὸν αὐχένα δίκρουν (= furca) ἐμβάλλονται ἐν τῇ ἀγορᾷ, καὶ μετὰ τοῦτο γυμνοὶ αἰκίζονται (= virgins caesi) ἀποψύχουσιν.

³ Dionys. H. ix, 40: τὸν δὲ ἕτερον οἱ τῶν ἱερῶν ἐπίσκοποι συλλαβόντες ἐν ἀγορᾷ μάστιξιν αἰκισάμενοι καθάπερ ἀνδράποδον ἀπέκτειναν.

⁴ Livy xxii, 57, 3 a pontifice maximo eo usque virgis in comitio caesus erat, ut inter verbera expiraret.

⁵ Suet. *Dom.* 8 stupratores virgis in comitio ad necem caedi; cf. Pliny, *Ep.* iv, 11, 10 Celer . . . cum in comitiis virgis caederetur. Such was probably the fate of the seducer and the guilty slaves in 273 B.C., though Oros. iv, 5, 9 says merely — corruptor . . . consociique servi supplicio adfecti sunt.

⁶ Festus (p. 241 M.) = Preibisch, *Frg. Pont. Lib.* p. 4, no. 18.

⁷ Tab. 8, 1 (Brunns⁶). Cicero, *de Rep.* iv, 10, 12; Cornutus on Pers. *Sat.* 1, 123; Horace, *Ep.* ii, 1, 153 ff., speaks of the *formido fustis*. It is very surprising to see Mommsen, *Strafr.* 918⁶, take this of crucifixion without a particle of evidence. Even Usener in his superb essay, *Italische Volksjustiz*, *Rh. M.* lvi (1901), 3, apparently misunderstood the real meaning of the *fustis* here.

and scourged to death under his order, has been shown by Mommsen to be, if not positively true, at all events the older form of the story.¹ The same is true of the other notorious traitor, M. Manlius, in 384. The tradition which represents him as accused by the *duoviri perduellionis*, adding *verberando necatus est*, is undoubtedly the older version and has the greater inner probability.² With the light of this established usage for *perduelles*, it is not improbable that Vitruvius Vaccus in 329 was so treated, the decree in his case running *verberatum necari*; ³ similarly in 323 one tribe voted regarding the rebels at Tusculum *puberes verberatos necari*; ⁴ in 311 the Samnites had captured a Roman outpost and — *verberibus foedum in modum laceratos occiderant deditos*; ⁵ in 213 the sentiment at Rome was that the traitor Dasius of Arpi was *verberandus necandusque*.⁶ From this period on there is a break in the tradition in accord with the more humane tendencies of the second and first centuries B.C. We have already seen the recrudescence of this punishment under the early empire, that heyday of antiquarian revivals. It continued late, though efforts seem to have been made to stop it.⁷ Different passages in the *Digest* except *veterani* expressly, and the *honestiores* in general,⁸ but it was still used, and examples are recorded at Constantinople even as late as 605 and 760 A.D.⁹

¹ See Mommsen's article in *Hermes*, v (1871), 241. The older version is preserved in Livy ii, 41, 10, that the father — *verberasse ac necasse peculiumque filii Cereri consecrasset*, and Val. Max. v, 8, 2 (*pater*) *damnavit verberibusque adfectum necari iussit* (cf. Plin. xxxiv, 15).

² cf. Mommsen *op. cit.* 252. The older version here is that of *Nepos* (frg. 5, apud Gell. xvii, 21, 24) *verberando necatus est*. Cf. also the variant preserved by Livy vi, 20, 12.

³ Livy viii, 19, 4.

⁴ *ib.* 37, 11. Val. Max. ix, 10, 1 in an inaccurate version based on Livy uses the expression *verberatos securi percuti*. He evidently took Livy to mean decapitation, and he may have been correct.

⁵ Livy ix, 31, 2.

⁶ *id.* xxiv, 45, 2.

⁷ For some late examples cf. Mommsen, *Strafr.* 985⁴.

⁸ Especially xlix, 18, 1 and 3. Cf. xlviii, 19, 8, 3.

⁹ See *Chron. Pasch.* 8th indict. 604–5 A.D. and Bury's *Later Roman Empire*, II, 464. It is clear to me that this is the strange penalty which Dio Cass. frg. 11, 6 (Boiss.) reports as invented by Tarquin: *καὶ τότε πολιτῶν τινὰς ἐν τῇ ἀγορᾷ καὶ ἐν τοῖς τοῦ δήμου δῆμοσι σταυροῖς* (= palis) *τε γυμνοὺς προσέδησεν καὶ ῥάβδους*

We are now in a position to understand the meaning of that punishment which by a law of the Twelve Tables was meted out to the harvest thief. The regulation ran as Pliny quotes it, *suspensum Cereri necari*.¹ In the light of the sacral execution for the seduction of a Vestal, for treason, for the *occantatio*, etc., it can hardly be doubted that here the victim was fastened to a tree or furca and then scourged to death.²

A word more as to the *arbor infelix*. Livy glosses with *furca* (§ 10); Dio Cassius speaks of a ξύλον δίκρουν (= *furca*),

(= *virgis*) αἰκισάμενος ἀπέκτεινεν. καὶ τοῦθ' ὑπ' ἐκείνου τότε ἐξευρεθὲν καὶ πολλάκις ἐγένετο. This must be nearer the original form of that annalistic record which Cass. Hem. (followed by Pliny, above p. 55, n. 1) misinterpreted as crucifixion, and connected foolishly with another legend. Here, too, belongs the curious tradition presented in the Chronogr. of 354 and probably derived from Suet. *de Regibus* (see Reiff. *Suet. Rell.* p. 320) of Tarquinius Superbus: inter duos pontes a populo Romano fuste mactatus (est) et positus in circo maximo sub delphinos. The exact value of this clearly aetiological notice is problematical, but it is significant that its author felt that such a death was appropriate for a tyrant and *perduellus*, as the Senate later judged in the case of Nero.

¹ Plin. xviii, 12 = Tab. 8, 8 (Bruns⁶). Mommsen, *Strafr.* 631⁸ and 918⁸ and many others have thought crucifixion was intended, Greenridge (cf. p. 51, n. 2) and others hanging. Neither view is probable. A parallel to this fastening in a furca is the annual sacrifice of dogs who were *vivi in furca sambucea armo fixi* at Rome (Pliny xxix, 57). One wonders if, when Tiberius crucified the priests of "Saturn" on the trees of their sacred grove in Africa, he might not have been following some ancient Roman ritualistic precedent (Tert. *Apol.* 9).

² Parallel with the civil penalty of scourging to death ran the military punishment commonly called the *supplicium fustuarium*. This seems to have been the ordinary death penalty in Polybios' time, as indeed in his well-known discussion of the Roman army he mentions no other, but describes this at some length (vi, 37). Examples are rare before his time, the earliest being the *decimatio* made by Appius Claudius in 471 (Livy, ii, 59, 11, compared with v, 6, 14 and Frontinus, iv, 1, 34). Some other cases are recorded in Livy, *Per.* lvii; Sallust, *Hist.* iv, 27; Plut. *Crassus* 10; *Ant.* 39; Vell. Pat. ii, 78, 3; Tacitus, *Ann.* iii, 21, etc. Occasionally this punishment was inflicted upon rebels and ringleaders of revolt though of foreign nationality. So Caesar—de Accone . . . more maiorum supplicium sumpsit (*B. G.* vi, 44, 2), and doubtless the same penalty was later inflicted on Gutruatus, of whom it is said—verberibus examinatum corpus securi feriretur (*ib.* viii, 38, 5). The final decapitation here is merely an indignity to the corpse and has nothing to do with the execution as such. Scourging to death was not unknown among the Hellenes, cf. Soph. *Aias*, 106 and 240 ff., *Antig.* 308, and Plato, *Laws* 872 B. The ἀποτυπανισμός was a different thing, however; see Plut. *Per.* 28 ξύλοις τὰς κεφαλὰς συγκόψαντες.

in another passage of a *σταυρός* (= *palus*); Suetonius uses *furca* and *palus*. All are doubtless correct. The *arbor infelix* is evidently the more primitive usage; in its place for convenience' sake a forked stick was probably introduced later, or the criminal might have been fastened merely to a post.¹ Just what the *arbor infelix* was it is impossible to answer now with certainty. The definitions given by ancient authorities differ *toto caelo*, and what facts we have make it impossible to accept either.² The closest parallel is the regulation *am argen norden Baum henken* of the old German law. This was a dead tree with a northern exposure.³ There is some reason for believing that the *arbor infelix* of the carmen was a dead tree, possibly a fruit tree.⁴ As practically all fruit trees fork close to the ground, the criminal's hands were probably bound to the branching arms, his neck coming naturally into the crotch, where it might have been fastened by a cross-bar. The transition from this to an ordinary *furca* would have been an easy one.⁵

¹ In the military *supplicium fustuarium* the culprit, it seems, was not even fastened, a usage which approaches closely to the old German *Spießrutenlaufen*.

² Especially Cato in Festus (p. 92 ff., Cato, *inc. lib. reliq.* 27, p. 87, 18 ed. Jordan.) followed by Pliny, xvi, 108, and xxiv, 108; and Tarquiti Priscus and Veranius cited by Macrobi. *Sat.* iii, 20, 3 ff. See the classic discussion by Bötticher, *Baumkultus*, 302 ff. and 311 f.

³ Cf. Grimm, *op. cit.* 257 f.

⁴ The vulgar distinction between *felix* and *infelix* was fruit-bearing or fruitful, and non-fruit-bearing or unfruitful. In addition to the passages cited by Bötticher add Livy, v, 24, 2 (cf. vi, 31, 8), and Seneca, *Dial.* 12, 9, 1, for *felix*, and for *infelix* Vergil, *Ecl.* 5, 37 and Servius, *ad loc.* Now a dead tree has always been felt as under a sort of curse, and especially lugubrious is a dead fruit tree, or a barren fruit tree; the parable of the fig tree illustrates the general feeling. It is not impossible that a tree struck by lightning might have been meant, certainly such a tree would have been included under the general term *infelix*. Cf. Pliny xiv, 119 and xvi, 24. Possibly the line of Flamininus (Plut. *Vit. Flamin.* 9) where he calls the *σταυρός*, *ἄφλοιος* and *ἄφνυλλος*, might point to a dead tree as the earliest usage for crucifixion, but the words are quite as appropriate of a mere beam. The use of *infelix* for the cross is not technical, occurring in the classical period to my knowledge only in Seneca, *Ep.* 101, 14 *illud infelix lignum*, and Min. Fel. *Oct.* 23, 11 *infelicitis stipitis portio*.

⁵ A word is here in place on the general character of the punishment. The strongest argument for its antiquity is its fearful cruelty. Other forms of death were doubtless quite as painful for the victim, but certainly none was so ghastly for the spectator to watch. The horror and aversion must have been intense as

Many other interesting questions arise as to the relative antiquity of this punishment compared with others in use at Rome,¹ the religious significance of the consecrate dead tree-trunk or stake,² of the *obductio capitis*,³ of the whipping or scourging as a purificatory rite,⁴ etc., but it is impossible to treat them here.

the rods fell again and again on the quivering flesh, as the raw bones were laid bare, and ribbands of lacerated flesh dropped from the body of the victim, who alternately swooned and revived from sheer agony. Sometimes the walls of the chest and abdomen were so lacerated that the vital organs burst out (cf. the Martyrol. of the 24th of April and the 16th of July). Nor was the suffering over in a few minutes; with sturdy men it must have lasted from two to three hours or even longer. In 1685 Titus Oates, only forty-eight hours after a flogging which at first was thought to have killed him, received seventeen hundred blows on the bare back and yet survived (Macaulay, *Hist. of Eng.*, Bost. ed. I, 436 f.). The similar German custom of the *Spießrutenlaufen* also made tremendous demands on the culprit's endurance. Austrian courts-martial were allowed to assign as high as ten double passages through the Gasse, which amounted to six thousand blows, and yet the culprits sometimes survived even this ordeal. In Germany, in 1791, a deserter was condemned to 12,000 blows; and in 1705, at Zittau i. S., six deserters were condemned to twenty-four double passages through a Gasse of 336 men, which involved upward of 16,000 blows in all. These men could not possibly have survived such brutal treatment. See on the details of these punishments, R. Wrede: *Die Körperstrafen*, Dresden, 1898, p. 423 ff. In the most recent case, that reported from Harbin, Manchuria, under date of Oct. 23, 1908 (in the American press), by a correspondent of the London *Globe*, where ramrods were used, the statement is made that "after three hours of horrible agony under the rods, the thief died." No wonder that even the brutal Domitian was *atrocitate poenae conterritus*.

¹ I venture to conjecture that it was the oldest of them all. It was certainly more brutal than any other, and hence probably more primitive. Further, it was the first stage in decapitation, the *culleus*, and hurling from the rock. These were all more merciful, and so probably humanitarian modifications of the older usage, which was then retained, largely as a matter of form, as so many other outlived institutions dragged on a mere formal existence at Rome. Its sacral character for the harvest thief, the seducer of a Vestal, etc., also points to a very high antiquity.

² Cf. the *delubrum*, a stake or bare trunk worshipped as a god, and a discussion of its significance in Bötticher, *op. cit.* 219 f., and O. Schrader: *Reallex. d. indog. Altert.* (1901), 862.

³ This was a certainly a ritualistic consecration to the Manes, like that at the *devotio* of the Decii, etc.

⁴ The sacral character of beating with rods is evident from the very primitive rite by which Mamurius Veturius (the old Mars) was driven out every March (καὶ τοῦτον ἔπειον ῥάβδοις λευκαῖς ἐπιμήκεσιν, Joh. Lyd. *de Mens.* iv, 36). See

the excellent discussion by Usener, *Rh. M.* xxx (1875), 209 ff., and especially Frazer, *op. cit.* III, 122 ff. Frazer's theory that the scourging "was not to intensify the agony . . . but to dispel any malignant influence" is very plausible for this and similar rites. It is not improbable that the old Romans beat to death a culprit with rods quite as much for the sake of dispelling the malignant elements from his body and hence from his fellow-tribesmen, as to punish him for his crime.

ADDENDUM

The article by R. Freiherr von Mansberg, *Die antike Hinrichtung am Pfahl oder Kreuz, Zeitschrift für Kulturgeschichte*, Vol. VII (1900), pp. 52-80, did not come to hand until the preceding pages had been electrotyped. Fortunately it contains nothing new that militates against my conclusions. Von Mansberg follows Fulda closely with occasional corrections in which he is often undoubtedly right. P. 65 f. he follows Fulda in assuming the common use of ropes in binding on the cross; p. 66 in treating Cicero, *Verrés*, V, 10-12, as a case of crucifixion, using, by the way, for citation a thoroughly discredited text reading (cf. also G. Long's note on the passage), but in neither case does he contribute anything in support of the views against which I have argued in full above. P. 74 he accepts John 21, 18 and 19, as a reference to crucifixion, a perfectly untenable view, despite the Fathers. For the sake of completeness in the citation of the most recent literature, I might add W. W. Blake, *The Cross, Ancient and Modern*, New York, 1890.